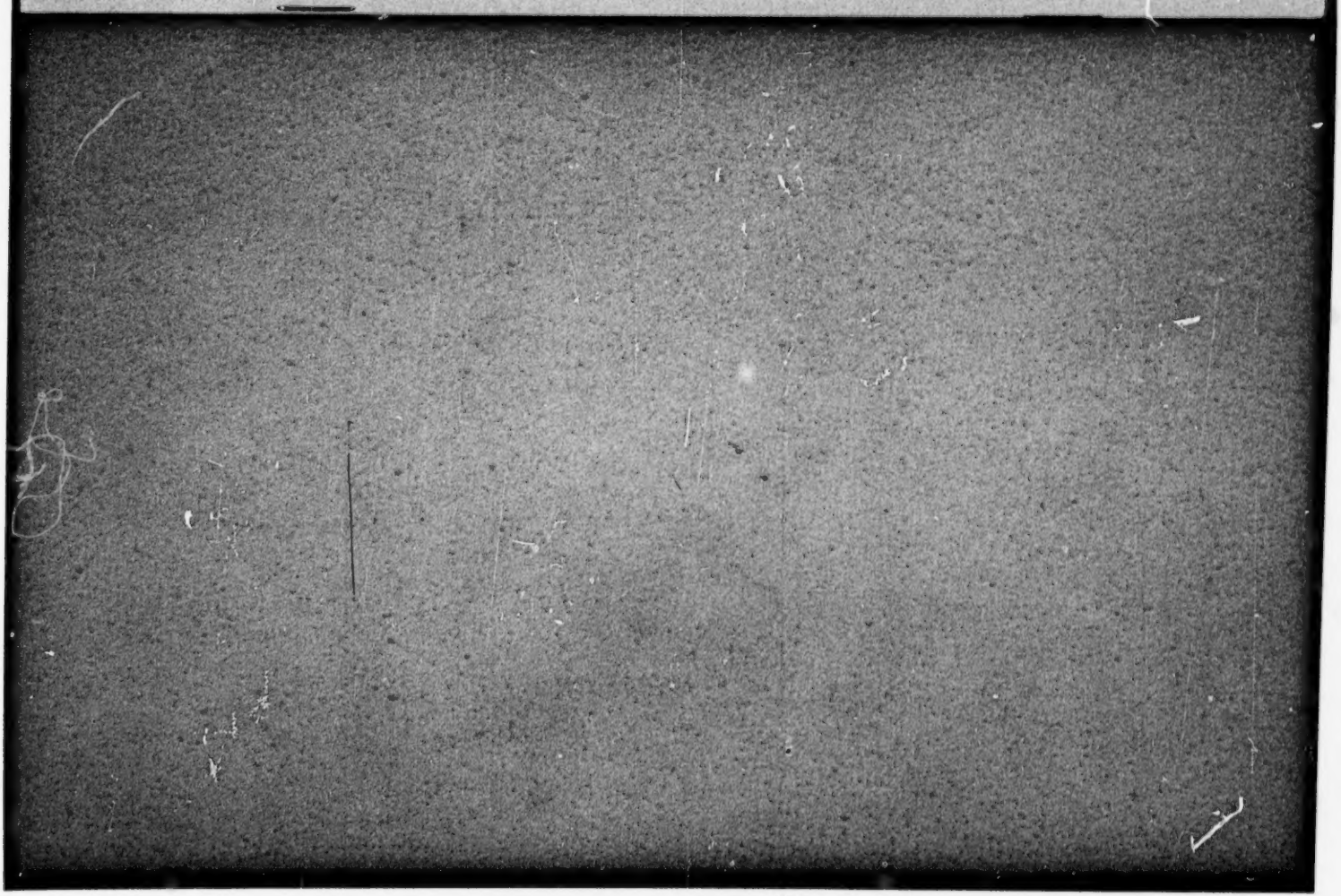

SEP 27

IN THE

Supreme Court of the United States

No. 73-1736

LEON WEISS, ETHEL WEISS,
MELCO INTERNATIONAL, LTD., and
MELCO INTERNATIONAL, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY MEMORANDUM FOR PETITIONERS

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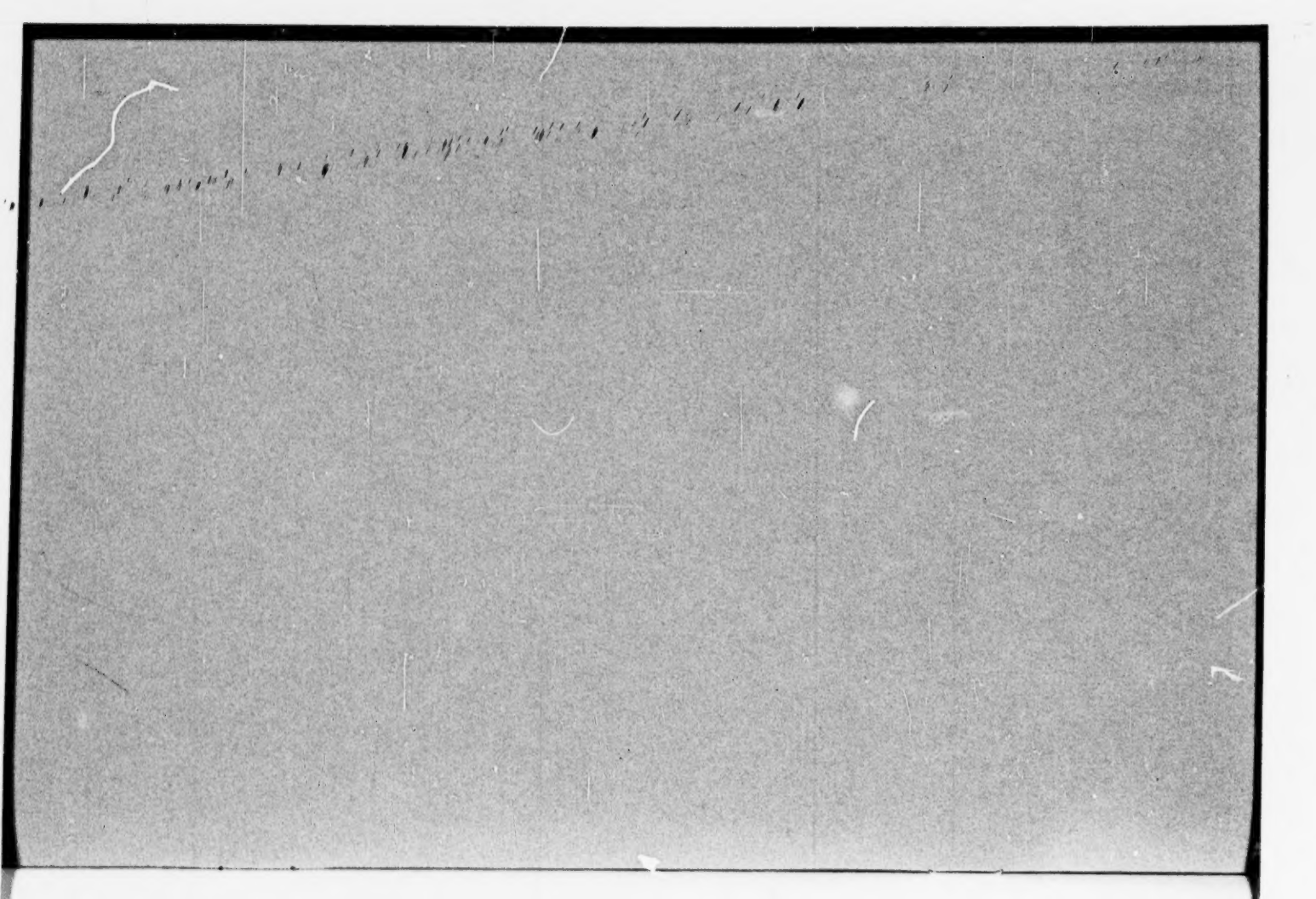

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1. *The Trial Judge's Improper Conduct of the Trial.* The government wholly ignores the fair trial issue presented to this Court for purposes of determining whether the writ of certiorari should issue. Instead, it merely quotes at length from the lower court's opinion (U.S. Memorandum 3-7) to the effect that the trial judge's conduct did not "amount to denial of a fair trial" (Pet. App. A, at 16a). A mere perusal of petitioners' analysis of what occurred at trial (Pet. 7-16) should indicate that the appellate court's finding

that the trial judge's conduct of the proceedings did not deprive defendants of a fair trial creates a serious conflict with this Court's decision in *Offutt v. United States*, 348 U.S. 11 (1954), and the Seventh Circuit's decision in *United States v. Dellinger*, 472 F.2d 340 (1972), *cert. denied*, 410 U.S. 970 (1973), and is clearly inconsistent with accepted standards relating to the function of the trial judge (*see* Pet. 22-27).

2. *The Insufficiency of the Obstruction of Justice Count.* The government urges this Court not to consider the claim that Count 19, the obstruction of justice count, was constitutionally defective because the count did not specify the alleged conduct violating the statute and thus failed to contain assurance that petitioners Leon and Ethel Weiss were tried on charges deliberated upon by the Grand Jury. The reason offered is that "[t]his contention was raised for the first time in the court of appeals; since the objection to the indictment was not timely raised it should not be considered by this Court" (U.S. Memorandum 7).

Contrary to the government's statement, the motion to dismiss Count 19 was presented at the outset of the trial, at the conclusion of the government's case, as well as at the end of the case (2 J.A. 5-6, 63-67; 3 J.A. 222-28, 317, 321). On each of those occasions, the point was made that Count 19 was deficient in that it did not allege any affirmative conduct of the defendants which could constitute a violation of 18 U.S.C. §1503, and that the facts which were alleged – the failure to produce subpoenaed documents – did not constitute an obstruction of justice.

This essential fact fully distinguishes *United States v. Thompson*, 356 F.2d 216 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966), and *United States v. Fistel*, 460

F.2d 157 (2d Cir. [illegible]), on which the government relies (U.S. Memorandum 7-8). In *Thompson*, the point at issue – a technical pleading one – was first presented only after the trial was over by a motion in arrest of judgment. In *Fistel*, the technical pleading claim was presented initially on appeal, rather than at trial. *Fistel* makes plain that, had a timely motion to dismiss been made, as occurred here, the district court would have been required to dismiss (*see* 460 F.2d at 160-161).*

The government also argues that, since petitioners did not seek details of their conduct in a bill of particulars to amplify the charges against them, "they knew what conduct was being charged by the grand jury" (U.S. Memorandum 9). This contention misconceives petitioners' point. The constitutional defect alleged is that Count 19 failed to provide required guidance to the prosecutor, the court and the trial jury of those charges of conduct of the petitioners which the grand jurors deliberated upon and found adequate for indictment. *See Russell v. United States*, 369 U.S. 749 (1962). What the petitioners allegedly "knew" of their conduct is entirely irrelevant and not responsive to petitioners' point.

3. *The Improper Joinder of Defendants.* As a ground to support the decision below, the government urges that the joinder in the indictment of petitioner Ethel Weiss with the other defendants was proper under Rule 8(b), Fed. R. Crim. P. (U.S. Memorandum 11). The Court of Appeals,

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* The issue presented here and also urged below is *at the most* another reason, based on the same record, for the same result urged below: dismissal of Count 19. This circumstance does not constitute the improper raising of a new issue on appeal. *See Dewey v. Des Moines*, 173 U.S. 193, 197 (1899); *Chase Nat'l Bank v. United States*, 116 F.2d 625, 627-28 (2d Cir. 1940).

however, chose not to decide the case on this ground – describing it as "this difficult question" – and preferred, instead, to assume *arguendo* the contrary so that the issue could then be determined on the basis of lack of prejudice from the misjoinder (Pet. App. A, at 13a).

The government's position here and the authorities it cites (U.S. Memorandum 11) further confirm the widespread confusion as to the proper implementation of Rule 8(b). In *United States v. Gullia*, 304 F. Supp. 30 (W.D. Pa. 1969), the court read Rule 8(a) as authorizing the challenged joinder of defendants – a conclusion at variance with the express language of the rule and the holdings of the Second Circuit that Rule 8(a) governs joinder of offenses against the same defendant and not the joinder of different defendants. The other authority cited by the government, *United States v. Honesty*, 459 F.2d 1279 (D.C. Cir. 1971), was the case of a defendant unlike Mrs. Weiss, who had been physically present and involved in all the transactions in the indictment which formed the basis of the charges against the other defendant. The government's reliance on these authorities underscores the need for an authoritative ruling by this Court on the questions raised by petitioner Ethel Weiss.

4. *The Denial of the Corporate Defendants' Constitutional Right to the Assistance of Counsel.* In response to the corporate petitioners' claim that they were denied their constitutional right to the assistance of counsel (Pet. 35-38), the government suggests that "Mr. Hack's abstention from participation in most of the trial may well have been the result of defense strategy" (U.S. Memorandum 12).

Nothing that the lower court said, nothing that the prosecutor said – in short, nothing in the record – supports the government's rank speculation. On the contrary, Mr.

Hack's actions were consistent with his position (*see* Pet. 8) that, because of his complete incompetence in criminal and trial matters (*see* 1 J.A. 104), he would do more harm than good for his clients by participating in the trial (2 J.A. 2-3). Indeed, the Court of Appeals' finding that Hack lacked "qualifications to represent the corporate defendants at trial" and that "[t]he conduct of the trial judge, including his excoriation of Hack, displays of temper and threats of contempt, was wholly unjustified" (Pet. App. A, at 17a; *see* Pet. 15-16) amply explain Hack's conduct.

5. *The Impropriety of a New Jurisdictional Hearing.* The government's argument that the remand for a new hearing to determine whether the trial court had *in personam* jurisdiction over the corporate petitioners was "entirely proper" because the lower court had refused the government's "request for a hearing" and had therefore "deprived the government of the opportunity to prove jurisdiction" (U.S. Memorandum 12) perpetuates a gross error committed by the lower court (Pet. App. A, at 19a).

The fact is that a hearing had been held – on March 16, 1971 (*see* 1 J.A. 91-103). In that hearing, affidavits and memoranda of law were filed (1 J.A. 26-30, 89-90; *see* 1 J.A. 6). The government further filed numerous documentary exhibits (1 J.A. 31-88). Oral argument was also presented (*see* 1 J.A. 91-103).

At that hearing, "[t]he burden was upon the government to establish current jurisdictional facts" to prove that the "corporations were subject to the [trial] court's jurisdiction at the time of filing of the indictment" (Pet. App A, at 19a). Yet, the government voluntarily chose to meet its burden of proof by offering corporate

documents which ultimately failed to support the government's jurisdictional claim.

Having had the opportunity to establish jurisdiction, but having failed to meet its burden of proof, the government should not now be given a second opportunity to attempt to establish a basis for the trial court's jurisdiction in a new hearing.

Thus, in remanding the case, the Second Circuit clearly came into conflict with the Ninth Circuit's ruling in *Danziger v. United States*, 161 F.2d 299, *cert. denied*, 332 U.S. 769 (1947). Whether or not the government in *Danziger* offered to present evidence on the jurisdictional question (*see* U.S. Memorandum 12 n. 4), the fact is that the government there, just as here, had the burden of proof, which it failed to uphold. Having so failed, it could not expect to be accorded a new hearing.

For the foregoing reasons, and for the reasons set forth in the Petition, petitioners request that a writ of certiorari issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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